Office - Supreme Court, U.S.
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FEB 11 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DIAMOND SHAMROCK CHEMICALS COMPANY, *et al.*,

Petitioners,

v.

MICHAEL F. RYAN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

WENDELL B. ALCORN, JR.
GEORGE D. REYCRAFT
One Wall Street
New York, New York 10005
(212) 908-7000

Attorneys for Petitioners Diamond Shamrock Chemicals Company, The Dow Chemical Company, Hercules Incorporated, Monsanto Company, T H Agriculture & Nutrition Company, Inc.

Of Counsel:

CADWALADER, WICKERSHAM & TAFT
Attorneys for Diamond Shamrock Chemicals Company
One Wall Street
New York, New York 10005

RIVKIN, LEFF, SHERMAN & RADLER
Attorneys for The Dow Chemical Company
100 Garden City Plaza
Garden City, New York 11530

KELLEY DRYE & WARREN
Attorneys for Hercules Incorporated
101 Park Avenue
New York, New York 10178

TOWNLEY & UPDIKE
Attorneys for Monsanto Company
405 Lexington Avenue
New York, New York 10017

CLARK, GAGLIARDI & MILLER
Attorneys for T H Agriculture & Nutrition Company
The Inns of Court
99 Court Street
White Plains, New York 10601

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The district court's ambitious, but legally unsupportable, efforts to transform these actions into a single class adjudication will ultimately fail because of the clear impropriety of its choice of controlling legal precepts. Indeed, the court created new law and manipulated the Federal Rules in order to conduct a trial never before countenanced in the federal system. Review by this Court is necessary now. The parties and the public should not be forced to endure years of useless litigation, during which time claims will be withheld and millions of dollars wasted each month by the parties in the mistaken belief that Judge Weinstein's ruling is valid. The public will be ill-served when, several years hence, the entire body of "Agent Orange" cases must be retried to correct the glaring errors raised by this petition.

ARGUMENT

The Importance of the Questions Presented and the Clear Usurpation of Power by the District Court Require Review at This Time.

The importance of the questions presented has not been denied. The basic argument advanced by respondents is that review at this stage in the proceedings would be premature (Resp. Br. at 6-7).* That assertion, however, should not deflect the Court's attention from the important issues presented by the petition concerning the illegality of the unwarranted exercise of power by the district court. Review after trial and appeal will be unable to correct the travesty that is being worked not only on petitioners but also on the thousands of absent Australian, New Zealand, and American veterans (and their families) who may claim personal injuries related to exposure to Agent Orange and the other herbicides utilized by the United States Armed Forces in Southeast Asia during the period 1961 to 1972.

This Court has not hesitated, under like circumstances, to review denials of extraordinary writs. *See, e.g., World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286 (1980); *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U.S. 336 (1976); *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964); *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469 (1962); *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 (1959); *La Buy* v. *Howes Leather Co.,* 352 U.S. 249 (1957). It has not refrained from reviewing at a preliminary stage the propriety of striking jury demands, *Dairy Queen, supra; Beacon Theatres, supra,* or denying a motion to dismiss for lack of personal jurisdiction, *World-Wide Volkswagen*

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* References ("Resp. Br. at —") are to the Brief in Opposition; references ("A—") are to the Appendix to the Petition for Writ of Certiorari; references ("—a') are to the Appendix to the Brief in Opposition.

Corp., supra, or ordering a party to submit to a physical and mental examination, *Schlagenhauf, supra,* or referring a matter to a special master, *Los Angeles Brush Manufacturing Corp.* v. *James,* 272 U.S. 701 (1927), or remanding a case to a state court for trial because of federal-court congestion, *Thermtron Products, supra.* A special willingness has been shown to correct misapplication of the Federal Rules before trial in precedent-setting situations. *See, e.g., Schlagenhauf, supra,* 379 U.S. at 112; *Los Angeles Brush, supra,* 272 U.S. at 706 ("where the subject concerns the enforcement of the . . . Rules which by law it is the duty of this Court to formulate and put in force . . . it may . . . deal directly with the District Court . . . ."); *McCullough* v. *Cosgrave,* 309 U.S. 634 (1940).

Respondents seem to urge that because of the size, complexity and "particular needs of this litigation," the district judge has unlimited latitude in fashioning a class action (Resp. Br. at 6, 9-10). To the contrary, however, the district court has patently exceeded its lawful power by attempting to resolve each of the cases transferred to it under 28 U.S.C. § 1407 for pretrial supervision in a single, international, personal injury class action. Common question, which fall far short of the predominance required by Rule 23(b)(3), are being fabricated by the court. The district court candidly acknowledged that its two primary purposes in certifying these proceedings as a single class action were to encourage settlement and to try to involve the Executive Branch and Congress in an attempted resolution of this complex controversy (A9-A10). The *conclusion* of certification was first assumed without analysis. From that assumption, every precondition—typicality commonality, notice, adequacy of representation, and choice of law—was rationalized retrospectively. Judge Weinstein's zeal to create an unprecedented case control mechanism by distorting Rule 23 beyond its intended limits violates

Federalism and constitutes a blatant usurpation of the power of Congress and of this Court to formulate the guidelines that govern federal procedure.

Respondents naively and incorrectly contend that the contemplated trial will have a final and binding effect on all class members (Resp. Br. at 13). With respect to those persons who do not call or write to receive individual notice, it is extremely unclear what effect, if any, a verdict would have. Rather than attempting to rebut petitioners' point that proper notice will not be provided to all absent class members, respondents' Kavenagh Affidavit merely indicates that individual notice would entail a measure of effort and expense greater than respondents are willing to undertake (Resp. Br. at 54a-62a). It does not support respondents' contention that individual notice is unreasonable. Their spurious argument fails utterly in light of this Court's holding in *Eisen* v. *Carlisle & Jacqueline*, 417 U.S. 156 (1974), where the individual claims amounted to only $70 and where the preparation of notice to the class required examination of information contained in voluminous records eight to twelve years old. The "unambiguous requirement of Rule 23" of "individual notice to identifiable class members," *id.* at 176, unequivocally can not be suspended where the individual claims of the veterans and their families are so substantial. The rights of the absent class members are not protected, and thus the right of petitioners to a determination that satisfies due process requirements and is binding is undeniably compromised.

Respondents would have this Court assume that *all* persons in the defined class will ultimately receive individual notice under the two-step media solicitation plan (Resp. Br. at 20-21). At best, no more than a very small percentage of putative class members (all Vietnam veterans and their families) will ever receive written notice. For example, no provision for *any* individual notice has been made for

putative Australian and New Zealand class members. How can the district court, consistent with due process, then purport to bind all absent class members? The readily apparent answer is that it can not. Where, as here, there is no assurance that even a bare majority of potential claimants will receive actual notice, no legal rationale for certification exists.

The purported trial in these proceedings is unlikely to be finally dispositive of the litigation, despite the apparent wishes of Judge Weinstein to the contrary (A14-A16). It is unrealistic to assume that, for example, a state court would dismiss a complaint brought several years from now by a veteran alleging personal injuries from exposure to Agent Orange, who never received legally sufficient notice of the instant proceedings. That state court, faced with such a claim in the future, would in all probability allow inquiry into such collateral matters as sufficiency of notice and the correctness of the predictions of "national consensus law" as compared to the reality of the substantive law of the forum state. Furthermore, the lack of due process would similarly render any settlement at this time incomplete and, therefore, improbable (A10).

Turning to the preconditions set out in Rule 23, respondents argue that the district court's certification was justified by certain issues which they deem common and predominating (Resp. Br. at 14-16). However, the questions of "general causation," duty to warn, negligence, the government contract defense, and misuse are not in fact common to the class. "General causation", for example, simply can not be common because a plethora of diseases and symptoms of multifarious origins are alleged by respondents.*

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* In response to interrogatories propounded by petitioners, respondents allege that they, individually or as a class, suffer from 146 disparate diseases and symptoms. *See* Appendix to this Brief, *infra*.

In addition, Judge Weinstein's proposed trial of "general causation" would unconstitutionally shift the burden of proof to defendants on an issue of liability. Respondents attempt to disguise this effect by suggesting that defendants should be anxious to prove lack of causation in order to preclude further litigation (Resp. Br. at 13). But the practical impossibility of proving a negative—that Agent Orange could *not* have caused, under any circumstances, the types of myriad ailments and symptoms of which respondents complain—violates petitioners' due process rights by, in effect, making causation an affirmative defense.

The "general causation" trial advocated by respondents, and adopted by Judge Weinstein, also raises serious concerns relating to the impermissible bifurcation of issues. Trying "general causation" separately will necessarily obstruct subsequent triers of fact when they are asked to determine proximate cause in a coherent and unbiased manner. Furthermore, a verdict limited to "general causation" will not answer the question of specific cause and, therefore, can not dispose of the ultimate issue of liability. Causation is an indivisible issue that may not be fragmented into hypotheticals and specifics and presented to different juries. Judge Weinstein's attempt to do so is inconsistent with the efficient allocation of judicial resources and is violative of the Seventh Amendment. *See Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931).

Moreover, each of the issues must properly be tried under the substantive laws of the various states, and not under the "national consensus" federal common law standard that has been formulated below.* Judge Weinstein's "national consensus" determination directly conflicts with important decisions of this Court involving the proper deference to

* Judge Weinstein's opinion on "national consensus law" appears in the Appendix to the Brief in Opposition at 9a-53a.

be afforded to the states by federal courts. *Day & Zimmerman, Inc.* v. *Challoner*, 423 U.S. 3 (1975). Jurisdiction here is based on diversity of citizenship, which *a fortiori* entails the adjudication of state-created rights and duties (13a). Judge Weinstein is not permitted to misapply Rule 23 opportunistically in order to modify the various states' laws, merely because he perceives these actions as constituting a single, large and complex litigation. Where state laws differ, class certification can not supply uniformity. *See* 28 U.S.C. § 2072 (1976); *Snyder* v. *Harris*, 394 U.S. 332, 337-38 (1969). As this Court stated in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941):

> Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" . . . .

See also Erie Railroad Co. v. *Tompkins*, 304 U.S. 64 (1938).

Only Congress or, interstitially, the federal courts when interpreting the *Constitution* or a *federal statute*, can create a substantive federal rule of decision. A single federal court has no power to manipulate various choice of law rules to create federal common law. It is one thing to say a federal court's function sitting in diversity is to predict how a state court would rule if presented with certain facts. It is another for Judge Weinstein to displace in one fell swoop all existing state laws of manufacturers' liability and announce a "national consensus" federal common law in order to create "common" questions sufficient to permit class certification.

Judge Weinstein must not be allowed to ignore with impunity the principles underlying *Erie* and *Klaxon* by applying his federal rule of decision under the guise of state law. Nor should his delusive distinction between federal common law as applied under 28 U.S.C. § 1331 and 28 U.S.C. § 1332 be allowed to stand (22a-25a). If the dispositive issues of a claim require application of federal common law, then the claim "arises under" Section 1331. *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 99 (1972); *Ivy Broadcasting Co.* v. *American Telephone and Telegraph Co.*, 391 F.2d 486, 492 (2d Cir. 1968).

Judge Weinstein's reliance on *In re Air Crash Disaster Near Saigon, South Vietnam on April 4, 1975*, 476 F. Supp. 521 (D.D.C. 1979), and *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975), in applying federal common law is misplaced and only highlights the gross error of the class certification (47a-50a). Claims arising from an airplane crash—a single, discrete occurrence —do not present the myriad individual causation issues involved in determining the etiology of the broad spectrum of diseases and symptoms allegedly caused by exposure to Agent Orange or other herbicides more than a decade ago. Even so, the air crash cases were *not* class actions, and in *In re Paris Air Crash*, liability was not even in issue. Judge Weinstein's assertion concerning *In re Air Crash Near Saigon* that "District of Columbia law was really only a surrogate for a national substantive law of liability" is simply unfounded (48a).

Just as class certification can not supply uniformity in state law, neither may federal judicial fiat. The district court purports to predict that the highest court of every state would simultaneously adopt identical sustantive principles in the context of this litigation. The district court states flatly that "so far as can reasonably be predicted, . . . *each*

state would probably apply the same law, that is to say either federal or national common law" (15a) (emphasis added). That conclusion, respondents argue, is correct and ensures that their list of "common issues" are fully common, because the laws of each of the states and territories are transformed into one monolithic body of law (Resp. Br. at 16-17).* Based on that incredibly oversimplified assumption, Judge Weinstein attempts to enact for all jurisdictions a uniform law of products liability (21a). It is not Judge Weinstein's prerogative to apply laws that have not yet been written. *Sony Corporation of America* v. *Universal City Studios, Inc.*, —— U.S. ——, 52 U.S.L.W. 4090, 4100 (No. 81-1687, Jan. 17, 1984).

By casting aside such relevant considerations as plaintiffs' residences and the states where defendants are incorporated or do business, Judge Weinstein improperly concludes that "national consensus law" must apply because "those [states'] contacts are dwarfed by the national contacts . . . ." (46a-47a). To the contrary, the state contacts in each individual case are most significant. The court's class certification maneuver serves merely to mask the substantial state interests present, and tends to camouflage the absence of proper venue in the Eastern District of New York and the lack of diversity jurisdiction in a number of the actions. *See World-Wide Volkswagen Corp., supra.*

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* Respondents concede that even application of "national consensus law" may not eliminate all variations among state law, and suggest that subclasses be used in those areas where "minor variations" occur (Resp. Br. at 17). However, Judge Weinstein repeatedly has stated that subclasses will not be employed. As his order clearly indicates, Judge Weinstein is convinced that subclasses will not be required because "all the transferor states would look to the same substantive law for the rule of decision on the critical substantive issues" (13a).

This Court should grant review. Never before has any court of appeals permitted even a nationwide class action to be brought under diversity jurisdiction. The inherent differences in various states' laws and the guiding principle of Federalism have precluded such a result. Never before has any court of appeals permitted certification of a mass products liability class action. The non-existence of legitimate common questions that predominate has been uniformly viewed as conclusive. Yet here the district court has certified an international, personal injury, products liability class action under diversity jurisdiction.

The questions raised by this petition are ripe for review.

Conclusion

Petitioners respectfully pray that a writ of certiorari be granted to review the judgment of the Court of Appeals for the Second Circuit.

Dated: February 11, 1984

Respectfully submitted,

WENDELL B. ALCORN, JR.
GEORGE D. REYCRAFT
One Wall Street
New York, New York 10005
(212) 908-7000

Attorneys for Petitioners

APPENDIX

The following lists the diseases and symptoms respondents allege were caused by exposure to Agent Orange and other herbicides:

Abdominal bleeding, Abdominal mass (excised), Abdominal pain, Abnormal cell proliferation, Anemia, Angiosarcoma, Anorexia, Asthenia, Atherosclerosis, Basal cell carcinoma, Bladder sphincter dyssynergia, Blepharoconjunctivitis, Bowel Incontinence, Carbohydrate metabolism disorders, Cardiovascular disorders, Cellular atrophy, Change in urine color, Chest pains, Chloracne, Cholangiocarcinoma, Chronic lymphocytic leukemia, Cysts, Dark and bloody stools, Decrease in IgM & IgD, Decrease in B-cell & T-cell capabilities, Decreased cell proliferation, Diabetic states, Diarrhea, Disanthenia, Dramatic change in bowel habits, Elevated blood lipid levels, Elevated red blood count, Elevation of eosinophil, Fat metabolism disorders, Fatigue, Fibrosarcoma, Fibrosarcomatous mesothelioma, Fibrosis of the lung, Fibrous histiocytoma, Gastrointestinal disorders, Genetic defects, Glandular swelling, Headaches, Hearing Impairment, Hepatoma, High blood pressure, Hirsutism, Hyperkeratosis, Hyperpigmentation, Hypertension, Immune system disturbances, Inability to swallow, Increased cholestrol, Increased frequency of urination, Increased white cell count, Insomnia, Internuclear ataxia, Internuclear opthalmoplegia, Intolerance to cold, Irritated eyes, Ischemic heart disease, Itching, Leiomyosarcoma, Leukemia, Liver damage, Loss of appetite, Loss of libido, Loss of lymphoid tissue, Loss of sensory feelings, Loss of strength, Loss of thymus tissue, Low blood pressure, Lower back pain, Lymphoma, Marked

left lateral nystagmus, Marked sensory ataxia, Miscarriages, Multiple sclerosis, Muscle aches, Muscle tightening, Myocardial infarction, Myofibrosarcoma, Nausea, Needle-like pains, Neurasthenia, Neurofibrosarcoma, Neurological deficits, Night sweats, Organ enlargements, Orthostatic hypotension, Pancreatic dysfunction, Paraplegia, Peripheral neuropathy, Polyneuropathy, Porphyria, Porphyria cutanea tarda, Pounding in chest, Prostate enlargement, Pulmonary pathologies, Quadriplegia (low level), Rhabdomyosarcoma, Rectal bleeding, Rectum prolapsement, Recurrent fever, Renal disorders, Respiratory disorder, Retroperitoneal neurogenic sarcoma, Right foot drop, Sacral decubiti, Scalp tumors, Seizures, Severe diplopia, Shingles, Sight impairment, Sinus problems, Skin infections, Skin rashes, Slowing of nerve impulses, Smell impairment, Sore throat, Spastic colon, Speech impediment, Stomach cramps, Taste impairment, Tumors, Ulcer (left ischial), Unnatural aging of nails, Urinary tract disorders, Various psychobehavioral disorders, Vomiting, Weakness in extremities, Weight loss, and the following other types of cancers: Bladder, Brain, Colon, Gastrointestinal, Glandular, Hard palate, Liver, Lung, Mouth, Stomach, Testicular, Thyroid, Tongue.